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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5768

FRANK XAVIER FRANCISCO,

Petitioner,

v.

J.S. GATHRIGHT, Superintendent,
Bland Correctional Farm,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The memorandum opinion of the Court of Appeals (App. 50-51) is not officially reported. The order of the United States District Court for the Eastern District of Virginia, at Alexandria (App. 36-42) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1973 (App. 52). The petition was filed November 17, 1973, and was granted March 4, 1974. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a person in custody pursuant to the judgment of a State court who had presented a claim to the State courts in the course of the direct criminal proceedings, is to be denied federal habeas corpus relief on the same claim merely because the State Supreme Court has rendered a subsequent decision in another case which confirms that his claim is meritorious.

2. Whether a person in custody pursuant to the judgment of a State court who claims that such custody is, in two independent respects, in violation of the Constitution of the United States, must await federal habeas corpus relief on one ground merely because the other ground should have been presented to the State courts.

CONSTITUTIONAL PROVISIONS

Petitioner's claims for federal habeas corpus relief asserted in the courts below arose under the following Constitutional provisions:

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

Amendment XIV, Section 1

". . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

Petitioner was prosecuted under Section 54-524. 101(a) of the 1950 Code of Virginia, as amended, which, prior to its repeal in 1972, provided as follows:

"**§54-524. 101. Unlawful acts; penalties.**—(a) Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally:

"(1) To distribute, or possess with intent to distribute a controlled drug.

"(2) To manufacture a controlled drug.

"A conviction for a violation of this §54-524. 101(a) may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed."

Petitioner sought federal habeas corpus relief under 28 U.S.C. §§2241, *et seq.* These statutory provisions are somewhat lengthy and are set forth in Appendix A hereto.

STATEMENT OF THE CASE

This case involves important procedural questions concerning the rights of persons held in custody pursuant to a judgment of a State court to a speedy and efficient adjudication of the lawfulness of such custody under the Constitution of the United States.

Petitioner's claims have not been adjudicated on the merits by the court of appeals, nor is this Court called upon to do so. Hence, a brief sketch of his substantive claims and their underlying facts will suffice for an understanding of the procedural issues involved.

Petitioner Frank Xavier Francisco was arrested in the bedroom of his apartment, following the warrantless, forcible entry by Investigator William Luzi and other officers of the Fairfax County, Virginia, Police Department, shortly after midnight on February 18, 1971. (App. 30, 37) At that time a quantity of heroin was seized from his person and from atop a dresser in the room. (App. 30, 37) Another individual present in the apartment was released without charges placed against him. (App. 30) Petitioner was immediately taken before a Justice of the Peace for an initial appearance and held in the Fairfax County Jail in lieu of money bond. (App. 31) Petitioner's arrest was predicated on an informer's tip and Luzi's observations through the curtained window in the living room of petitioner's apartment. The informant, Robert DeBruin, who then had narcotics charges pending against him, had several hours earlier communicated to Luzi that petitioner had purchased heroin and was "cutting it up" for distribution. (App. 30, 36) Pursuant to plan, DeBruin entered petitioner's apartment with marked money, purportedly to purchase drugs, at about half-past midnight. (App. 30, 37) DeBruin had been instructed by the police to pay petitioner for the drugs in front of the window if he observed the narcotics on the premises. (App. 30, 37) When Luzi observed DeBruin hand the money to petitioner he knocked on the apartment door and upon an occupant's refusal to admit him, forced the door open. (App. 30, 37) Unknown to the officers, DeBruin had not observed any drugs in the apartment, but had paid petitioner to

settle a debt. (App. 30, 37) Nothing passed from petitioner to DeBruin. (App. 37)

Petitioner was charged with the unlawful possession with intent to distribute a controlled drug, heroin, and was incarcerated prior to trial by reason of his inability to make bond. (App. 26) Prior to trial, petitioner moved to suppress the narcotics seized on the grounds that his arrest was not supported by probable cause and that the officer's failure to secure a warrant was not excused by exigent circumstances. (App. 15) One week before the scheduled trial date of May 28, 1971, a hearing was held on the motion to suppress. (App. 16) The motion was taken under advisement and, on the morning of trial, denied. (App. 16, 17)

At trial, the Commonwealth's witnesses were Luzi, DeBruin and a chemist. (App. 27) Luzi testified as to the events immediately surrounding the arrest and seizure; the chemist identified the material seized as heroin. (App. 27) DeBruin testified that petitioner had agreed to sell heroin to him that evening and had sold heroin to him on one previous occasion. (App. 27) The defense presented evidence that both petitioner and DeBruin were addicted to heroin, and that DeBruin's reputation in the community for truth and veracity was poor. Petitioner did not testify in his own behalf. (App. 27) In the course of its charge to the jury, the court instructed them, over defense counsel's objection, of the statutory presumption that "a conviction for possession of a controlled drug with intent to distribute may be based solely upon the evidence as to the quantity of the controlled drug possessed." (App. 19) The jury returned a verdict of guilty on the offense charged, sentencing petitioner to eight years' imprisonment at hard labor. (App. 21)

Petitioner sought appellate review of his conviction by petitioning the Supreme Court of Virginia for writ

of error and supersedeas. (App. 25) Among the grounds for appeal were (1) that he was arrested and the drugs were seized in violation of the Fourth Amendment in that the warrantless, forcible entry into petitioner's dwelling to effect his arrest was not based on probable cause or required by exigent circumstances and (2) that the above quoted instruction was based on a presumption without rational basis, thereby denying petitioner due process. (App. 28-29) In a per curiam order dated December 14, 1971, the Supreme Court of Virginia declined to review petitioner's conviction. (App. 35)

In October 1972, petitioner commenced this habeas corpus proceeding in the United States District Court for the Eastern District of Virginia, at Alexandria, filing his petition on the form prescribed by the Court. (App. 2-10) As grounds for the relief sought, petitioner presented to the state courts. (App. 4-8) The Commonwealth was ordered by the district court to show cause why the writ should not be granted. In its answer filed November 11, 1972, the Commonwealth admitted that petitioner had exhausted his state remedies on both claims. (App. 11) It contended, however, that petitioner should again present to the state courts the question of the constitutionality of the challenged instruction. (App. 12) This contention was predicated on the decision of the Supreme Court of Virginia handed down some one month earlier, *Sharp v. Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972), invalidating the instruction on state and federal constitutional grounds. (App. 12) The district court *sua sponte* entered summary judgment against petitioner, ruling against him on the merits of the Fourth Amendment claim and declining to reach the merits of the challenge to the instruction. (App. 36-42) Petitioner noted his appeal from this decision and a certificate of

probable cause was granted by the district court.

On January 24, 1973, the Commonwealth sought to initiate state habeas corpus proceedings in the Circuit Court of Fairfax County. (App. 47-48) Petitioner moved in United States District Court to stay these proceedings on the ground that the precise issue of whether petitioner should be remitted to the courts of Virginia for collateral attack on his conviction was the subject matter of an appeal. (App. 43-46) The district court denied the motion without a hearing. (App. 49)

The United States Court of Appeals for the Fourth Circuit under Rule 7 of its local rules, considered the case without briefs or oral argument. On August 27, 1973 it issued a memorandum decision affirming that part of the district court's order which relegated the instruction claim to the State courts. (App. 50-51) Moreover, the court of appeals vacated the district courts resolution of the merits of petitioner's Fourth Amendment claim on the ground that subsequent state proceedings could possibly moot that claim for relief. (App. 51).

SUMMARY OF ARGUMENT

The exhaustion of state remedies doctrine originated and developed under principles of federalism as a guide to the federal courts' discretion in the exercise of their habeas corpus jurisdiction. Federal courts were to stay their hands until the asserted claim of Constitutional magnitude which had run their full course. *See Ex parte Royall*, 117 U.S. 241 (1866); *Ex parte Fonda*, 117 U.S. 516 (1886); 28 U.S.C. §2254. Once the State courts had been given an initial opportunity to pass upon and correct alleged violations of its prisioners' federal rights, the interests of comity were satisfied and the federal courts should act. *See Fay v. Noia*, 372 U.S. 391 (1963).

The exhaustion doctrine does not require that repetitious applications for relief predicated on the same ground be made to state courts to pursue successive or alternative remedies. *See Picard v. Connor*, 404 U.S. 270 (1971). Absent an intervening change in federal law which casts the legal issues in a fundamentally different light, once fairly presented to the state courts, a federal claim is ripe for adjudication in federal court. *See id.* Petitioner had fairly presented to the state judicial system in the course of the original criminal proceedings his claim that a jury instruction given at his trial stated a presumption without a rational basis, hence a denial of due process. The Virginia Supreme Court's subsequent decision sustaining the identical claim in an unrelated case is no authority to demand that petitioner tread the alternative path of collateral attack in state court. *See Roberts v. LaValle*, 389 U.S. 40 (1967). The possibility of successful application to the state is an insufficient foundation upon which to erect a needless procedural hurdle to the prompt resolution of this claim in federal court. *See id.* Petitioner has exhausted his state remedies. He should not be required to exhaust himself by becoming a ping pong ball batted back and forth between two judicial systems.

The principal aim of the writ of habeas corpus is to provide for the swift judicial review of asserted unlawful restraints. *See Peyton v. Rowe*, 391 U.S. 54 (1968). The derivative exhaustion doctrine applied by the court of appeals under which an exhausted claim is to be dismissed solely because it shares a habeas corpus petition with a distinct and independent unexhausted claim interferes with this objective. Such interference is wholly unjustified by the considerations of federalism under which the exhaustion doctrine developed. The considerations of judicial economy offered in support

of the derivative exhaustion concept are inappropriate for the formulation of a policy at odds with the fundamental values protected by the writ of habeas corpus. A prisoner's fundamental right to be free from unlawful restraint should not be sacrificed on the procedural altar of judicial convenience. *See Tyler v. Swenson*, 483 F.2d 611 (8th Cir. 1973); *United States ex rel Levy v. McMann*, 394 F.2d 402 (2d Cir. 1968). Petitioner had already presented to the state courts the claim that evidence introduced against him at trial was derived from an unlawful search and seizure. Federal adjudication of that claim must not be withheld merely because a distinct and independent claim could be asserted in a state collateral attack on his conviction.

ARGUMENT

I.

THE EXHAUSTION OF STATE REMEDIES DOCTRINE EMERGED AND DEVELOPED AS A JUDICIAL ACCOMMODATION BETWEEN THE INTERESTS OF FEDERALISM AND THE NEED TO PRESERVE THE EFFICACY OF THE WRIT OF HABEAS CORPUS. IT REQUIRES THAT STATE COURTS BE GIVEN AN INITIAL OPPORTUNITY TO PASS UPON AND CORRECT VIOLATIONS OF CONSTITUTIONAL RIGHTS BEFORE THE FEDERAL COURTS INQUIRE INTO THE MATTER.

The instant case concerns the application of the "exhaustion of state remedies" doctrine, now codified[1] in 28 U.S.C. §§2254(b), (c), which requires petitioners for writs of habeas corpus in federal courts to have first pursued their remedies in the courts of the State in

[1] No substantive change was intended in the codification. *See* S. Rep. No. 1559, 89th Cong., 2d Sess. 2.

which they were convicted. Sections 2254(b), (c) provided:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."
>
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedures, the question presented."

The source of the exhaustion doctrine is *Ex parte Royall*, 117 U.S. 241 (1886) which involved a petition for writ of habeas corpus filed prior to trial.

Royall contended that the statute under which he was being prosecuted was unconstitutional, hence the indictments under which he was being held were void. *See id.* at 244. This Court first disposed of the lower court's dismissal on jurisdictional grounds, holding that the federal courts had "jurisdiction upon writ of *habeas corpus*, to inquire into the cause of [Royall's] commitment, and to discharge him, if he be held in custody in violation of the Constitution." *Id.* at 250. However, the dismissal was found justified under the principles of comity. The obligation of State courts to enforce and protect Constitutional rights, which the Court had held to be an inappropriate basis on which to oust the federal courts of jurisdiction, was found to be sufficient reason to allow the state trial to proceed without federal intervention.

"The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen it is competent for the state court to pass. Under such circumstances, does the statute imperatively require the circuit court, by writ of habeas corpus, to wrest the petitioner from the custody of the state officers in advance of his trial in the state court. We are of opinion that while the circuit court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Id.* at 250-51.

Federal courts were not at liberty to presume that the decision of the State court when Royall's case was

determined at trial would be otherwise than that required by the Constitution. *See id.* at 252.

Subsequent to *Royall*, it was made clear that State proceedings should normally run their full course prior to federal court intervention by habeas corpus. Accordingly, in *Ex parte Fonda*, 117 U.S. 516 (1886), the principles of *Royall* were held to require federal courts to defer consideration of habeas corpus petitions during the pendency of direct appellate review of the conviction. Subsequently, it was determined that direct appellate review included proceeding to this Court by writ of error.[2] *See Wood v. Brush*, 140 U.S. 278, 290 (1891). The exhaustion doctrine was further refined to require that state collateral remedies be pursued with respect to contentions not reviewed on direct appeal, *see Mooney v. Holohan*, 294 U.S. 103 (1935), and that review be sought in this Court as part of the state collateral remedy, *see Darr v. Burford*, 339 U.S. 200 (1950).

Fay v. Noia, 372 U.S. 391, 435-38 (1963) abrogated the requirement that the state remedies which must be exhausted prior to consideration of a petition for writ of habeas corpus include review here by writ of certiorari. The petition for writ of certiorari was recognized an "unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes." *See id.* at 437. Not only was this Court's docket burdened by petitions for writs of certiorari which did not meet the stringent criteria of

[2] Prior to 1916, review on constitutional grounds of state criminal cases was available in this Court as of right. *See* Rev. Stat. of 1874, §709. When review by writ of error was replaced by the discretionary certiorari procedure, *see* Act of September 16, 1916, Ch. 448, §2, 39 Stat. 726-27, *now codified*, 28 U.S.C. §1257, the requirement that direct review be sought in this Court nonetheless apparently survived. *See Ex parte Hawk*, 321 U.S. 114, 116-17 (1944) (dictum).

Rule 19,[3] but the underlying rationale of comity was adequately served in other ways. *See id.* at 437-38. The discretionary certiorari jurisdiction exists, in the words of Mr. Chief Justice Vinson "to decide only those cases which present questions whose resolution will have immediate importance beyond the particular facts and parties involved," *see* F.M. Vinson, *Work of the Federal Courts*, 69 S. Ct. v, vi (1949). Accordingly, a person whose conviction was sustained by the highest state appellate court squanders judicial resources and merely delays presentation and resolution of meritorious claims in federal district court by petitioning for writ of certiorari to review a decision which is erroneous and obviously of vital importance to him, yet presents no "special and important reasons" for granting review in the sense of Rule 19.

In obviating petitions for writ of certiorari as prerequisites for federal habeas corpus relief, this Court removed "procedural hurdles to the achievement of swift and imperative justice on habeas corpus." *See id.* at 435. Since the consistent underpinning of the exhaustion doctrine from the time of its origins in *Ex parte Royall*, 117 U.S. 241 (1886) was comity, rather than jurisdiction, it followed that the state judicial machinery need only be given "the opportunity to pass upon and correct errors of federal law in the state

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[3] "Rule 19. Considerations governing review on certiorari

"1. A review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

prisoner's conviction." *See id.* at 438. It had earlier been made clear that comity required no more than giving state courts one such opportunity. Repetitious applications for relief need not be made notwithstanding that state law offered inexhaustible state remedies. *See Brown v. Allen*, 344 U.S. 443, 449 n.3 (1953).

As succintly stated by this Court three terms ago in *Picard v. Connor*, 404 U.S. 270, 275 (1971):

> It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. See *e.g.*, *Nelson v. George*, 399 U.S. 224, 229 (1970); *Irvin v. Dowd*, 359 U.S. 394, 404-405 (1959); *Ex parte Hawk*, 321 U.S. 114 (1944). The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. §§2254(b) and (c), reflects a policy of federal state comity, *Fay v. Noia*, 372 U.S. 391, 419-420 (1963); *Bowen v. Johnston*, 306 U.S. 19, 27 (1939), "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson*, *ante*, p. 249, at 250. We have consistently adhered to this federal policy, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950) (overruled in other respects, *Fay v. Noia*, *supra*, at 435-436). It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. See, *e.g.*, *Wilwording v. Swenson*, *supra*, at 250; *Roberts v. LaVallee*, 389 U.S. 40, 42-43

(1967); *Brown v. Allen*, 344 U.S. 443, 447-450 (1953).

With these principles in mind, we turn to consideration of the instant case. In the habeas corpus petition filed in federal district court, petitioner Frank Francisco collaterally attacked his state court conviction on two distinct grounds – (1) that a jury instruction denied him due process since it constituted a presumption without rational basis and (2) that evidence and testimony offered at his trial were derived from an unconstitutional search and seizure. (App. 4-8) Both of these claims had earlier been asserted (App. 28-29) and rejected (App. 35) in direct appeal to the Virginia Supreme Court. These claims were considered separately below; they warrant and will be given separate treatment here. For convenience, they will be referred to as the "instruction issue" and the "search and seizure issue," respectively.

II.

WHERE AN ISSUE RAISED IN A FEDERAL HABEAS CORPUS PETITION HAS BEEN FAIRLY PRESENTED TO THE STATE COURTS, STATE REMEDIES ON THAT ISSUE HAVE BEEN EXHAUSTED. ABSENT INTERVENING CHANGES IN FEDERAL LAW WHICH CAST THE ISSUE IN A FUNDAMENTALLY DIFFERENT LIGHT, REPETITIOUS APPLICATIONS TO STATE COURTS ARE NOT REQUIRED.

The district court, although declining to reach the merits of the instruction issue, recognized that "Francisco has exhausted his [State] remedies before on this issue." (App. 42) Indeed, this had been conceded by respondent (App. 11). The departure of this case from the norm, however, was occasioned by the Virginia Supreme Court's decision in *Sharp v. Commonwealth*,

213 Va. 269, 192 S.E.2d 217 (1972), which had then been recently handed down. In *Sharp*, the jury instruction which formed one prong of Francisco's collateral attack had been declared unconstitutional on both state and federal grounds. *See* 213 Va. at ___, 192 S.E.2d at 219. The district court agreed with respondent's "suggest[ion] that it should be left to the state courts to determine whether the petitioner's case is controlled by *Sharp.*" (App. 41) The courts of appeals affirmed this holding. (App. 51) In so doing, the courts below departed from *Roberts v. LaVallee*, 389 U.S. 40 (1967) and the consistent holdings of this Court that a person seeking federal habeas corpus relief need only have fairly presented his case once to the state courts.

Roberts v. LaVallee, supra, involved virtually the identical procedural situation to that presented in the instant case. The state trial court had rejected Roberts' request for a free transcript of his preliminary hearing. After conviction and exhaustion of direct appellate review, Roberts collaterally attacked his conviction in federal court on the ground that the refusal to provide an indigent defendant with a free transcript was unconstitutional. The district court rejected Roberts' claim on the merits. While his appeal from the decision was pending, the highest court of the state held that, as a matter of federal constitutional law, indigent defendants are entitled to a free transcript of their preliminary hearing. The court of appeals, while acknowledging that Roberts had exhausted his state remedies, "thought the constitutional necessity for federal court intervention was 'open to doubt' and that 'the question ought to be decided in favor of permitting a state court determination in the first instance'." 389 U.S. at 41. Accordingly, as did the district court here, it dismissed the petition without prejudice to renewal following the state court proceedings. This Court vacated the court of appeals decision,

noting that "[s]till more state litigation would be both unnecessarily time consuming and otherwise burdensome." 389 U.S. at 43. As in *Roberts*, there is no substantial state interest in ruling once again on petitioner's instruction claim; there is no reason shown why the Commonwealth wishes to burden its judicial system with an issue which is governed by established federal principles. In deciding *Sharp v. Commonwealth*, the Supreme Court of Virginia relied on no intervening change in federal or state law.[4] The state court decisions cited on the point antedated petitioner's state appellate proceedings by at least eight years. This Court's decision in *Leary v. United States*, 395 U.S. 6 (1969) was relied upon by the Supreme Court of Virginia to invalidate the challenged instruction on federal constitutional grounds; petitioner Francisco had urged upon the Virginia Supreme Court the excerpt of *Leary* which that court later cited as controlling in Sharp.[5] In short, the decisions below are in irreconcilable conflict with *Roberts v. LaVallee*, *supra*.

Roberts is in accord with the well-established principle that, while comity dictates that state courts are to be given an initial opportunity to pass upon and correct violations of constitutional rights, petitioners are not required to make repetitious applications for relief to state court. *See Wilwording v. Swenson*, 404 U.S. 249, 250 (1971); *Brown v. Allen*, 344 U.S. 443 (1953). This Court has rejected "procedural hurdles to the achievement of swift and imperative justice on habeas corpus" *See Fay v. Noia*, 372 U.S. 391, 435 (1963), and has

[4] As in *Picard v. Conner*, 404 U.S. 270, 276 (1971), this is not "a case in which an intervening change in federal law cast the legal issue in a fundamentally different light," thereby creating an exception to the rule that repetitious applications to state courts are not required.

[5] *Compare* 213 Va. at ___, 192 S.E.2d at 219 *with* App. 31.

recognized that "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty." *See Peyton v. Rowe*, 391 U.S. 54, 63 (1968). Resolution of petitioner's claim has hardly been swift. Nearly three years has now elapsed since petitioner's conviction. By the time this Court hears oral argument some two years will have elapsed since his petition for writ of habeas corpus was filed in district court. The Commonwealth should not be permitted to interpose the further delay incident to state habeas corpus proceedings and any appeals therefrom.

In the Brief in Response to the Petition for Writ of Certiorari, (hereinafter "Brief in Response") at p. 8, respondent glibly asserts that he "is at a loss as to what difference it makes whether relief is granted in the State courts or granted in the federal courts . . . ." However, respondent is not nearly so sure that relief will be granted in state court, warning that he "is not assuring this Court and has never attempted to assure the petitioner that he in fact would obtain the sought for relief." *See id.* at 9. To the contrary, as respondent concedes, even under the less stringent standards of direct appellate review, "the Virginia Supreme Court has, since the *Sharp v. Commonwealth* case was decided, refused to grant petitions for writs of error in other cases where a so-called *Sharp* instruction was given, without stating the reasons for denying such ruling." *Id.* Moreover, *Roberts* was specific in reaffirming the rule that repetitious applications to state courts need not be made, notwithstanding the possibility of success in such efforts. *See* 389 U.S. at 43. More importantly, it is not at all clear that the Virginia courts would entertain a state habeas corpus petition predicated on an issue which had been rejected on direct appeal. In Virginia habeas corpus proceedings, "[a]bsent a change of circumstances, previous determination of the issues by either state or

federal courts will be conclusive." *Hawks v. Cox* 211 Va. 91, 95, 175 S.E.2d 271, 274 (1970). *See* Va. Code Ann. §8-605 (1957 Repl. Vol.). The Virginia courts have not subsequently elucidated the "change of circumstances" which would override the conclusiveness of a prior determination. However, *Hawks*, citing *Stonebreaker v. Smyth*, 187 Va. 250, 46 S.E.2d 406 (1948) indicates that reliance in the petition on a "new constitutional mandate or change in the law" would be an appropriate basis for so doing. *See* 211 Va. at 95, 175 S.E.2d at 274. In *Stonebreaker*, the changed circumstances were a series of decisions by this Court which changed the law and upon which Stonebreaker predicated his claim for collateral relief. *See* 187 Va. at 259, 46 S.E.2d at 412-13. *See also*, *Stonebreaker v. Smyth*, 163 F.2d 498, 501-02 (1947). Whether *Sharp* amount to a "new constitutional mandate or change in the law" under the *Hawks* rule or is merely an application of settled principles appears to be an open question in the Virginia courts.

Respondent has also questioned whether the instruction issue was fairly presented to the Virginia Supreme Court in the Petition for Writ of Error and Supersedeas. The nub of his argument, stated in the Brief in Response, at p. 10, is as follows:

> The difference between petitioner's case and *Roberts v. LaVallee*, 389 U.S. 40, 19 L. Ed.2d, 88 S. Ct. 194 (1967), cited in the petition for a writ of certiorari, is that the petitioner has not really fully exhausted his State court remedies inasmuch as he has not yet presented to the State courts the question of whether his conviction is made infirm by the fact that a *Sharp* instruction was used at his trial. Obviously, this was not the issue confronting the Virginia Supreme Court when petitioner directly appealed his conviction, since the Virginia Supreme Court had not yet decided the case of *Sharp v.*

Commonwealth, supra, and therefore, in effect the petitioner in his federal habeas corpus petition was raising an allegation in a different context than it had been previously raised in the Virginia Supreme Court. As pointed out in *Picard v. Connor*, 404 U.S. 270, 30 L. Ed. 2d 438, 92 S. Ct. 509 (1971), this is sufficient basis for the District Court having sent the matter back to the State court for determination of petitioner's allegation.

Contrary to respondent's assertion, petitioner has presented to the Virginia Supreme Court the question of whether his conviction is Constitutionally infirm by reason of a jury instruction which amounted to a denial of due process. That court's belated recognition in *Sharp* of well-established Constitutional principles is respondent's justification for requiring petitioner to again present that claim to the state courts. This position flies in the face of the principle that habeas corpus petitioners are not required to make repetitious applications for relief. *Picard v. Connor*, 404 U.S. 270 (1971), does not dictate a contrary result. *Picard* makes it clear that a claim raised in federal habeas corpus proceedings must first have been "fairly presented to the state courts." 404 U.S. at 275. Petitioner has no quarrel with the proposition that a claim presented to the state courts in one context may not satisfy the exhaustion doctrine when presented to the federal courts in another. However, in applying that proposition to the instant case, it is manifest that the federal claim has been identically, not merely fairly, presented to the state court in direct appellate review proceedings.

Petitioner challenged his conviction on direct appeal, contending that a jury instruction deprived him of liberty without due process of law in that it set forth a presumption without rational basis. It was in this context that the Virginia Supreme Court refused, without

opinion, to set aside his conviction. It was in this context that the claim was presented to the district court. This contextual identity is strikingly illustrated by comparison of the *Sharp* opinion with the papers filed in petitioner's direct appeal. *See* n.5, *ante*, and accompanying text.

Respondent refers to the jury instruction which petitioner has consistently challenged as a "*Sharp* instruction." *See, e.g.*, Brief in Response at pp. 7-8. This shorthand notation, while suiting respondent's convenience, serves, however, to obscure the petitioner's claims as presented in both the state and federal judicial systems. At no time has petitioner relied upon *Sharp v. Commonwealth* as the basis for relief. The instruction was assailed under the principles set forth in *Leary v. United States*, 395 U.S. 6 (1969), which in turn were derived from *United States v. Romano*, 382 U.S. 136 (1965) and *Tot v. United States*, 319 U.S. 463 (1943). Thus, contrary to the district court's ruling that the question presented was "whether the petitioner's case is controlled by *Sharp*" (App. 41), a question it ordered answered in the first instance by the state courts, the instruction issue raised in the petition for writ of habeas corpus presented the question of whether *Leary*, *supra*, invalidated the instruction given. The state courts had already decided that question in the negative in declining to overturn the conviction in the appellate process. Comity did not require that they be given another opportunity.

Principles of comity were the foundation of the exhaustion doctrine formulated in *Ex parte Royall*, 117 U.S. 241, 250-51 (1886). Federal courts, in the exercise of their jurisdiction to inquire into the causes of custody under State process and to discharge persons held in such custody in violation of the Constitution, were to refrain from intervention into the State criminal proceedings.

The courts of the State were relied upon in the first instance to consider any Constitutional defects asserted. Since these courts were bound by the Supremacy Clause to follow the Constitution, a federal court would not presume in advance of decision that the states courts would default on this obligation. Once the judicial machinery of the state had passed upon the claim, however, petition for redress to the federal courts was appropriate.

The exhaustion doctrine "cannot be used as a blunderbuss to shatter the attempt at litigation of Constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence." *Braden v. Judicial Circuit Court*, 410 U.S. 484, 490 (1973). Petitioner has fully satisfied those purposes by presenting the instruction issue on direct appeal. Accordingly, he has exhausted his state remedies on that issue. He should not be additionally required to exhaust himself be becoming a ping-pong ball batted back and forth between two judicial systems.

III.

THE FUNDAMENTAL IMPORTANCE OF THE WRIT OF HABEAS CORPUS AS A SWIFT AND IMPERATIVE REMEDY MANDATES REJECTION OF A DERIVATIVE EXHAUSTION DOCTRINE UNDER WHICH FULLY EXHAUSTED CLAIMS IN A FEDERAL HABEAS CORPUS PETITION ARE DISMISSED SOLELY BECAUSE THE PETITION ALSO INCLUDES DISTINCT AND INDEPENDENT UNEXHAUSTED CLAIMS. NEITHER CONSIDERATIONS OF COMITY NOR OF CONVENIENCE WARRANT DELAY IN FEDERAL COURT EVALUATION OF CONSTITUTIONAL CLAIMS WHICH HAVE BEEN ALREADY BEEN REVIEWED IN THE STATE JUDICIAL PROCESS.

Petitioner predicated the collateral attack of his conviction on the search and seizure issue, as well as the

instruction issue. The district court reached the merits of the search and seizure issue notwithstanding its abstention on the instruction issue. (App. 37-41) However, the court of appeals vacated this action applying a derivative exhaustion doctrine under which the unexhausted instruction issue barred consideration of the fully exhausted search and seizure issue.[7] (App. 51) Since multiple claims are not infrequent in federal habeas corpus petitions and the circuits have taken inconsistent positions on the proper disposition of such claims, it is appropriate for this Court to decide the question.

The codification of the exhaustion doctrine does not explicity treat the situation in which multiple claims are asserted, referring to "the question presented." *See* 28 U.S.C. §2254(c). In the absence of such statutory guidance, courts of appeals have, without comment on the procedural question, reached the substance of exhausted claims in cases where the district court had correctly dismissed other claims for failure to exhaust state remedies. *See, e.g., McClain v. Swenson*, 435 F.2d 327 (8th Cir. 1970); *Pacheco v. Carberry*, 389 F.2d 93 (9th Cir. 1968); *Anderson v. Johnson*, 371 F.2d 84 (6th Cir. 1966). However, it was recognized that an exhausted claim could be so closely related to the unexhausted claims that federal resolution of the exhausted claims would constitute an unwarranted interference with the state court's resolution of the unexhausted issues. Thus, in *Blair v. California*, 340 F.2d 741, 744-45 (9th Cir.

[7]Part II, *ante*, treats the question of whether the instruction issue was exhausted. Of course, if this Court agrees with petitioner that it was, there is no need to directly pass upon the correctness of a derivative exhaustion doctrine. The instruction issue would then be considered on its merits by the district court, and that court's decision on that issue, and merits of the search and seizure as well, would be subject to review by the court of appeals. Accordingly, in this section of the brief, the instruction claim will be considered, *arguendo*, as unexhausted.

1965), the unexhausted issue was Blair's right to appointed counsel on direct appeal; the exhausted issues were those which he had raised on his *pro-se* appeal. As stated by the court of appeals:

> "These [exhausted] contentions are of a kind which would probably be once more reviewed by the appellate courts of California if it is determined that Blair is entitled to further state appeal proceeding by reason of the denial of his request for counsel on the prior appeal. It would create an impermissible anomaly were we to set machinery in motion which may ultimately afford Blair another state appellate court determination on these issues and then thwart or embarass the state court by purporting to decide those very questions on this appeal." *Id.* at 745 (Footnote omitted). *See also, United States ex. rel DeFlumer v. Mancusi*, 380 F.2d 1018, 1019 (2d Cir. 1967).

However, the instant case involves no such relation between the claims asserted.

Courts of appeals have, when squarely confronted with the exhausted-unexhausted multiple claim situation, reached disparate results. The Fifth Circuit, at least as early as 1960, indicated that the exhausted claim should be disposed of. *See Lee v. Wiman*, 280 F.2d 257, 264. However, less than nine years later, it upheld dismissal *in toto*, of a petition for habeas corpus which included both exhausted and unexhausted claims. *See Wheeler v. Beto*, 407 F.2d 816, 817 (5th Cir. 1969). The court based its ruling on dual considerations of comity and judicial economy. *Wheeler* and its progeny have been consistently relied upon to support similar affirmances by that court in subsequent cases. *See, e.g., Madley v. Ke'n*, 488 F.2d 865, 866-67 (5th Cir. 1974); *Johnson v. Wainwright*, 453 F.2d 385, 386 (5th Cir. 1971). However, the Fifth Circuit's position has hardly been unwavering; district court adjudications on the merits of exhausted claims

coupled with dismissals of unexhausted claims have been affirmed subsequent to *Wheeler* without consideration of derivative exhaustion doctrine announced in *Wheeler*. *See* cases cited in *Harris v. Estelle*, 487 F.2d 1293, 1297 (5th Cir. 1974). As the *Harris* court commented, the Fifth Circuit cases "are conflicting in result and none reason the basis for their differing disposition." *See id.* The court then reviewed the district court's disposition on the merits of the exhausted claim. *See id.* Similar action was taken in *Singleton v. Estelle*, 492 F.2d 671, 676-77 (5th Cir. 1974), the court noting that the policy against piecemeal litigation "admits of numerous exceptions." The only element of consistency which appears in the Fifth Circuit's line of cases is that the district court's determination as to whether or not to reach the merits of an exhuasted claim was upheld.

Other courts of appeals have taken a more definitive stand on the issue. In *United States ex rel Boyance v. Myers*, 372 F.2d 111 (3rd Cir. 1967), following dismissal of a multiple ground habeas corpus petition *in toto*, Boyance had collaterally attacked his conviction in state court on the unexhausted ground. During the pendency of that proceeding he refiled his federal habeas corpus action alleging only the exhausted claim for relief; the district court again dismissed his petition. *See id.* at 112. The court of appeals reversed, stating that the pendency of the state proceeding did not bar federal adjudication of different claims. *See id. Accord, United States ex rel Sniffen v. LaFollette*, 393 F.2d 726, 727 (2d Cir. 1968). It thus appears that the Third Circuit would require consideration of exhausted claims where distinct unexhausted claims were asserted in district court but not the subject of a pending state proceeding. This, in fact, was the development of the law in the Second Circuit. Relying on *Sniffen, supra*, that court held that assertion of unexhausted claims which were either unrelated to the

exhausted claims or frivolous were not appropriate grounds for dismissal of the entire petition. *See United States ex rel Levy v. McMann*, 394 F.2d 402, 404 (2d Cir. 1968).[8] *Accord, United States ex rel Marcelin v. Mancusi*, 462 F.2d 36, 39 (2d Cir. 1972). *See United States ex rel Annuziato v. Deegan*, 440 F.2d 304, 305 n. 1 (2d Cir. 1971). More recently, the Eighth Circuit held that "in the absence of unusual circumstances, District Courts should be required to consider those claims as to which the petitioner has exhausted his remedies even though he also raises unrelated or frivolous claims in his petition as to which he has not exhausted his remedies." *Tyler v. Swenson*, 483 F.2d 611, 614 (8th Cir. 1973). Those courts which had upheld dismissal *in toto* of multiple claim habeas corpus petitions have done so on bases of comity and of a policy against piecemeal litigation. As the decisions in *Boyance*, *Levy*, and *Tyler*, *supra*, make clear, comity is an erroneous predicate for such action and considerations of judicial economy must give way to the more important and fundamental interests served by the writ of habeas corpus.

Questions of comity can be disposed of easily. As more fully discussed in Parts I and II, *ante*, the premature intervention by federal courts into the State criminal process is prevented by requiring that the state courts be afforded an initial opportunity to pass upon and correct constitutional violations fairly and presented to them for adjudication. Comity requires no more; it does not demand that repetitious applications for relief be made to the state. By definition, an exhausted claim has been so presented. Hence, the interests of federalism do not demand that they be presented again. Of course, where the exhausted claim is closely related to the unexhausted

[8] The court below had earlier followed *Levy*. See Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969). The decision below represents an implicit rejection of that ruling.

claim, principles of comity would dictate restraint upon federal court action. *See, e.g., Harris v. Estelle*, 487 F.2d 1293, 1297 (5th Cir. 1974); *Blair v. California*, 340 F.2d 741, 745 (9th Cir. 1965). But that is not the case here. Petitioner's search and seizure claim (as to which there has never been a question of a failure to exhaust) is wholly independent and distinct from the instruction issue.

The problem of piecemeal litigation requires more extended analysis. This court has on several occasions comprehensively traced the roots and historical development of the of the writ of habeas corpus. *See, e.g., Fay v. Noia*, 372 U.S. 391, 399-426 (1963). That development need not be retraced here. It suffices to note that "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty." *See Peyton v. Rowe*, 391 U.S. 54, 63 (1968). More recently, this Court has spoken in terms of "preserv[ing] the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.'" *Braden v. Judicial Circuit Court*, 410 U.S. 484, 490 (1973). Judicial economy through avoidance of piecemeal litigation is a laudable goal. However, it should not override the prisioner's interest in obtaining prompt judicial review of exhausted claims by federal courts.

Delay in adjudication of the constitutional issues presented in habeas corpus petitions is more than an abstract detriment to the proper adjudication of the claims raised therein. As this Court recognized in *Peyton v. Rowe, supra*, issues raised in collateral attack frequently require factual determinations predicated on evidence outside the record of the criminal case. *See* 391 U.S. at 62-63. Where the federal adjudication is postponed, the district court's resolution of factual disputes may be flawed. *See id. Cf. Barker v. Wingo*,

407 U.S. 514, 532-33 (1972). Thus, a petitioner's substantive right to be free from unlawful restraint may be needlessly sacrificed by delay on the procedural altar of judicial convenience, and forever lost.[9] Of no less importance is the fact that even if deferral of federal adjudication merely postpones, but does not impair, vindication of constitutional rights, each day that a petitioner is incarcerated under a conviction obtained in violation of his rights will be time that he might properly have enjoyed as a free man. *See Peyton v. Rowe, supra*, 391 U.S. at 64.

The instant case starkly illuminates these issues. There is no reason to believe that petitioner could again raise the search and seizure issue in a state post-conviction proceeding. As noted in Part II, *ante*, the rule of *Hawks v. Cox*, 211 Va. 91, 95, 175 S.E.2d 271, 274 (1970), is that "[a]bsent a change in circumstances, previous determination of the issues by either state or federal courts is conclusive."[10] Petitioner's case appears to present no changed circumstances on the search and seizure issue so as to permit reconsideration by the state court. Thus he can only present that issue in federal court. Moreover, of the two issues presented, the search and seizure issue is singularly inappropriate for postponement. Although the district court disposed of the petition on the basis of the state court record (App. 36), the state court made no specific factual findings in support of its conclusions on probable cause and no factual findings on the question of exigent circumstances. (App. 18). Accordingly an evidentiary

[9] As *Peyton v. Rowe, supra*, recognizes, impairment of the fact-finding process is a two-edged sword. The state may also be aggrieved by an erroneous decision which would not have been rendered had unavailable evidence been presented.

[10] A claim already adjudicated in direct appeal appears to be demurrable in Virginia habeas corpus proceedings. *See* Smith v. Peyton, 408 F.2d 1009, 1010 (4th Cir. 1968).

hearing in district court may well be required. *See Townsend v. Sain*, 372 U.S. 293, 318 (1963). Thus delay carries with it the danger of fading memories and lost evidence. Moreover, petitioner's success in a state post-conviction proceeding on the instruction issue does not prevent the state from retrying him, or, since the challenged instruction went only to the issue of intent, possibly entering a judgment of conviction on the lesser included offense of simple possession and resentencing him on that conviction. On the other hand, if petitioner ultimately prevails on the search and seizure claim, the picture is quite different since substantially all of the Commonwealth's evidence was derived from the challenged search and seizure; as a practical matter retrial would be precluded. Thus, even the asserted interests of judicial economy are not fostered by the court of appeals decision; piecemeal litigation is promoted rather than avoided. If the decisions below are allowed to stand petitioner must present his instruction claim in a state post-conviction action including appeal. Should he not prevail there, ultimate disposition of his constitutional claims would be postponed only for that time. If he succeeds there, there will be the further delay of new criminal proceedings. Moreover, if the "succeeds" in a state collateral attack, he runs the risk of receiving a harsher sentence from a jury on retrial. *See Chaffin v. Stynchcombe* 412 U.S. 17 (1973).

The probabilities are that the federal courts will eventually be required to finally determine the search and seizure issue. There appears no reason why that adjudication should be deferred so as to allow the state to expend judicial efforts which may ultimately be for naught. The court of appeals speculated that "the possibility exists that [the search and seizure] claim for relief will be mooted." (App. 51). The more likely

course of events is, however, that the claim will be presented at a later time. The Commonwealth convicted petitioner before; there is no reason to believe that they cannot, without the challenged jury instruction, convict him of the lesser included offense of simple possession. In so doing, the Commonwealth will again introduce evidence derived from the search and seizure which petitioner has long asserted to have been unlawful. Moreover, "the mere possibility of a successful application to the state courts [is not] sufficient to bar federal relief." *Roberts v. LaVallee*, 389 U.S. 40, 42-43 (1967).

The derivative exhaustion doctrine applied by the court of appeals to defer consideration of the fully exhausted search and seizure claim solely because of the distinct and independent unexhausted instruction claim amount to a needless procedural barrier to the prompt vindication of Constitutional rights. At best it amounts to delay; at worst it taints the adjudicatory process. Principles of federalism do not demand such a doctrine, and the rationale of judicial economy is an inappropriate vehicle for interference with fundamental Constitutional rights. Petitioner has once presented the search and seizure claim to the courts of Virginia; those courts are now closed to him on that issue. He is entitled to a prompt federal determination of the claim. If it has merit, he must be freed from confinement. If it is without merit, he should be freed from the anxiety and uncertainty of an unresolved challenge to his incarceration.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the court of appeals directed to determine the merits of Petitioner's search and seizure claim or to remand it to the district court for consideration of the instruction claim and, if that court be so advised, reconsideration of the search and seizure claim.

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APPENDIX

28 U.S.C. §§2241, *et. seq.*

§2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless–

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue or order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an

absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the state court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdicition of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provision of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part, of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and

circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duty certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.